SUPREME COURT

OCT 8 1957

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. [redacted] 7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported; the unreported opinion is included herein as Appendix 1.

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appeals in this matter was entered on August 8, 1957; a petition for rehearing was filed by petitioners within the proper time, as provided for by rule of said Court of Appeals, and the order denying said petition for rehearing was entered on September 9, 1957. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether approximately twenty circuits out of a total number of twenty four hundred circuits contained in a coaxial cable leased by the Southern Bell Telephone Company to the United States government, all maintained and repaired by the telephone company, are a means of communication operated and controlled by the United States within the meaning of Title 18 U.S.C. §1362.

2. Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States.

3. Whether the conviction of petitioners, for conspiracy to destroy a means of communication operated and controlled by the United States, may stand, where the peti-

tioners had no knowledge of the existence of such means of communication or its operation and control by the United States.

4. Whether the petitioners could be convicted of conspiracy when the evidence showed no intent as indicated by the testimony in the case, that immediately after being solicited by one of the co-defendants to destroy telephone communications of the Southern Bell Telephone Company, they immediately informed the intended victim of the conspiracy and also informed the other alleged conspirators that they would not participate in such plan. Or if assuming *arguendo* that petitioners did enter the conspiracy whether their subsequent acts constituted a withdrawal.

5. Whether evidence of supposed overt acts which were unconnected with the petitioners and which were committed after petitioners' arrest by the authorities of the State of Illinois, could be introduced in evidence against the petitioners.

STATUTES INVOLVED.

Title 18 U. S. C. §371.

"Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 U. S. C. §1362:

"Communication lines, stations or systems.

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life and limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF FACTS.

The petitioners, Louis Joseph Abbate and Michael Louis Falcone, residents of Chicago, Illinois, were indicted by the Grand Jury of the Southern District of Mississippi, for the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code, which provides a penalty for the destruction of a means of communication operated or controlled by the United States. They were jointly indicted with James Shelby a resident of Silver Springs, Maryland, and Charles Perry, a resident of Jackson, Mississippi. All four defendants were found guilty by a jury and were sentenced to the custody of the Attorney General; Abbate for three years, Falcone for one year, Shelby for three years, and Perry for two years. On appeal the United States Court of Appeals reversed the convictions of Shelby and Perry because of an inadequate cautionary instruction on the limitation of statements introduced against Abbate and Falcone, and remanded their cases for a new trial. The convictions of Abbate and Falcone were affirmed.

The indictment arose out of a strike of the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an International Representative of the union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the Government.

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. The four men met in Chicago, where Shelby gave them plans of the various installations to be destroyed and

instructions as to how to do it. After Shelby left the City of Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the scheme and that they were going to inform the telephone company in Chicago, which they did.

The telephone company officials called the matter to the attention of the Chicago Police Department and thereupon the petitioners were arrested and brought to State's Attorney of Cook County, Illinois. Abbate and Falcone gave extensive information to the telephone company authorities and to the State's Attorney's office. It was because of this that the plan was brought to light and the prosecutions were instituted.

Abbate and Falcone were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company, and they pleaded guilty and received sentences of not exceeding three months.

Afterwards, indictments were returned in Mississippi charging the federal offense. We take the liberty of setting forth the evidence introduced by the government at that trial. Petitioners Abbate and Falcone introduced no evidence in their own behalf.

EVIDENCE INTRODUCED BY THE GOVERNMENT.

The government's case against petitioners Abbate and Falcone rests chiefly upon the testimony of McLeod, who at the time of the trial was confined at Oklahoma State Penitentiary for armed robbery, and was not indicted as a defendant. Prior to his conviction for armed robbery in Oklahoma, (R. 24) McLeod had been convicted for grand larceny in the State of California. (R. 119). McLeod refused to testify for the government (R. 172) until he had been

assured by the attorney for the Southern Bell Telephone Company that he would not be indicted. (R. 180) Although he testified that the United States Attorney did not promise immunity to him, McLeod was not indicted.

McLeod testified that on the 18th or 19th of April, 1955, Louis Abbate called and asked him to meet him if he wanted to make some money. McLeod replied that he was interested and at 9:00 o'clock in the evening, Abbate picked him up in his car while Michael Falcone followed them in another car (R. 29), and they drove to the corner of La Salle and Madison Streets in Chicago (R. 29) where they met James Shelby and went to a tavern in the Calvert Hotel. Shelby, who was introduced as a strike director of the Southern Bell Telephone Company strike, said that the company would not negotiate with strikers and that they would have to get rough with them. He said that he was after someone to go down south and get rough with them. McLeod, who was introduced as a dynamiter (R. 38), asked Shelby how he wanted the jobs done and Shelby said he wanted the huts (sheds containing telephone installations) demolished (R. 39). Shelby gave Abbate three envelopes (exhibit 1) which he said contained the plans of the installations of the Southern Bell Telephone Company (R. 44). There was a discussion as to the amount of dynamite they would need and Abbate said that they could get plenty of stuff and Falcone said he knew where he could get some. (R. 45). Shelby said that he would pay them $500 for each hut (R. 49). McLeod, Abbate and Falcone went to Falcone's house ostensibly for the purpose of locating some powder, but were unsuccessful. (R. 53, 54).

McLeod testified that the next morning Falcone said he was unable to get any powder and that he was "backing off." (R. 54). Falcone also told McLeod that he couldn't

go, that he had too much business to take care of in Chicago (R. 55). McLeod testified that he talked to Abbate who told him that he did not know where to get the dynamite, and he was backing out (R. 55). Abbate told McLeod that he did not want to go down there and gave McLeod $125 out of the $500 he supposedly received from one Audio (R. 56).

McLeod testified that he alone obtained four cases of dynamite from a friend (R. 58), and brought them with him on the Panama Limited. He got off at Canton and came to Jackson by cab where he registered at the Annabelle Hotel as John Morton (R. 61) from St. Louis, Mo. (R. 65). McLeod testified that he did not check in at the Walthall or Edwards Hotel as directed by Shelby because he had reason to believe that he was being sold out in Chicago by Abbate (R. 65). Abbate had said to McLeod before he left for Jackson, "we'll take the plans to the company and we'll walk away and we'll let them know what exactly is taking place down there." (R. 66)

After McLeod checked in at the Annabelle Hotel on April 22nd in Jackson, Mississippi, he met Charles Perry and told him that he was sent down there by James Shelby to shoot the installations (R. 68). They put the dynamite in Perry's car and went to the Regional Director's Office of the CIO. (R. 70) McLeod told Perry that there were others supposed to have been hired but that they never showed up and that he would have to work alone (R. 71). Perry told him that he would send a girl to show him the installations. Perry introduced him to Miss Sandridge who was to pretend to be his wife, and she drove McLeod to Meridian and Forest, Mississippi, pointing out the installations which he was supposed "to shoot". (R. 74, 75).

After McLeod and Miss Sandridge returned to Jackson, Mississippi, he met James Shelby and told him that the others had backed out and were going to double-cross them

(R. 81). They went for a ride and he was shown what a "hut" looked like and they discussed dynamiting the huts (R. 85). After the ride, McLeod said he was broke and Shelby gave him $100. McLeod told Shelby that Abbate kept the plans and again said that Abbate was going to double-cross him (R. 90).

The next morning he saw Perry with R. C. George and they started for Laurel. They drove about fifteen or twenty miles to a side road where they found a truck and the bag that he had given to Perry. He poured the dynamite out of the bag and they returned to Jackson (R. 92). The following day, Shelby told him to go back to Chicago and tell Tony Audio to get the plans from Abbate. McLeod said he did not want to go back to Chicago without doing what he came down to do (R. 99). Shelby took McLeod back to Canton and gave him $50 and McLeod bought a ticket for Chicago and arrived there on the 24th of April. McLeod testified that he was mad because he was pulled off the job and had to return to Chicago (R. 105).

When McLeod returned to Chicago, he called Abbate who asked him if any of the boys wanted to knock his ears down for that double-cross (R. 108). Abbate came to McLeod's home and said he was going to return the money and that he was afraid somebody was going to put a hole in his head (R. 109). McLeod testified further that before he went to Jackson, Abbate said, "We will take the plans down and get a certain amount of money and leave the plans with them and we can walk out, walk away, and it will let them know what the union's going to do down south." (R. 113).

McLeod was arrested in Chicago upon his return from Jackson, Mississippi; his parole was later revoked and he was returned to the penitentiary (R. 114).

On cross-examination, McLeod testified that he was convicted of grand theft in 1944 or 1945 in the State of California and he was convicted of armed robbery in 1951 in the State of Oklahoma (R. 119, 120). When asked to give the name of the friend from whom he obtained the dynamite he failed to remember the name although he stated he knew him five or six years (R. 149). He stated that he bought the dynamite in 1950 and placed it in his friend's garage (R. 151) but he could not remember the name of the man from whom he obtained the dynamite in Peoria, Illinois (R. 152).

McLeod also testified on cross-examination that Dan Byrd, an attorney for the Southern Bell Telephone Company, came down to see him and asked him to become a witness against the defendants (R. 170). He had been questioned three times previously by agents of the FBI and he had denied that he was involved in this case, and had refused to become a government witness (R. 173). Byrd came back and again asked him to help the telephone company (R. 175), that without his help, the government did not have a case. McLeod testified that Byrd came down to see him at the penitentiary to see if he could get him to change his story and help the telephone company (R. 175), but McLeod refused. Byrd came back two weeks later and again asked McLeod to help him, telling him that without McLeod's help the government did not have a case (R. 177) and this time Byrd succeeded in getting a statement from McLeod (R. 177), after he told McLeod that if he made a statement he would not be indicted (R. 180).

McLeod also admitted on cross-examination that he went to Jackson, Mississippi, on his own accord and that Abbate and Falcone refused to go, saying that they did not want any part of it (R. 182).

On re-direct examination he identified the cab driver (Riley A. Pharr), who drove him from Canton (R. 200). He denied that the United States Attorney promised that he would not be indicted or prosecuted (R. 202). He testified that he changed his story from the one he gave in Chicago because they did not take care of his family (R. 206).

Riley A. Pharr, a cab driver, testified that he picked up a man in Canton who had two or three suit cases, one of them large, and brought him to Jackson.. He registered at Annabelle Hotel (R. 218).

Woodrow Friedrich testified that he is a bartender for the L & L Tavern in Chicago. On April 18th or 19th, 1955, he saw Abbate and two others whom he could not identify (R. 229).

William H. Forsythe testified that he is an investigator for the Illinois Bell Telephone Company in Chicago. On April 25th a call was made by some unknown person who offered to sell information relating to persons who were going to cause destruction to the Southern Bell Telephone property (R. 240). The caller said that they had information of the diagrams and locations of the installations that were to be destroyed (R. 241). A meeting was arranged by Garrity of the telephone company for Officer Levinson of the Chicago Police Department to meet the caller (R. 241). Forsythe saw Abbate meet Levinson, who pretended that he was Garrity, a special agent for the telephone company (R. 244). On April 26th, Abbate called again and requested them to meet him at a certain tavern. At the previous meeting, Abbate had requested $2,000 for information relating to each state. Levinson and Forsythe went to the tavern where they saw Abbate who asked Forsythe if he had the money. Forsythe reached in his pocket and

pulled out an envelope containing what he described as a "poagey roll." Forsythe asked him if he had the sketches and maps for the money and Abbate said they were in the car but refused to let Levinson accompany him to the car. Thereupon Levinson identified himself as a policeman and arrested Abbate (R. 258). Abbate identified his car for them and told them the plans were in a brown envelope in the glove compartment (R. 259). Forsythe went to Abbate's car and obtained the plans (R. 260). They took Abbate to the office of the telephone company where Abbate made a statement.

On cross-examination, Forsythe testified that a reward of $5,000 was offered leading to the arrest and conviction of anyone damaging the property of the telephone company (R. 282). He knew that telephone calls had been received around April 18th by the company offering to give information (R. 278, 284). He admitted that Abbate gave him authentic information about McLeod and the plans.

The testimony of Officer Levinson was substantially the same as that of Forsythe. Levinson testified that he and Forsythe took Abbate to the office of the Illinois Bell Telephone Co., where a statement was taken from Abbate. (R. 314). Abbate said that he received a call on or about the 15th or 16th of April, from Tony Audio who asked him if he wanted to make some money. Audio asked Abbate if he could get a couple of fellows and "Italian confetti" which is another name for dynamite. Abbate said he thought he could and Audio told him that he would receive a call within a few days. On April 19, he received a call from a person who identified himself as James Shelby, and asked Abbate to meet him at a designated place in Chicago. Abbate, Falcone and McLeod met James Shelby and drove to a tavern at the Calvert Hotel. Shelby gave

Abbate the plans and asked him if he had the man to do the job. Abbate asked for some money and Shelby said that Tony Audio would give him some money the next day. The next day, Abbate met Audio who gave him $500 of which he gave Falcone $50 and McLeod $250. There was no mention made by Abbate of any dynamite (R. 319). Abbate met McLeod after he came back from Jackson, Mississippi. McLeod told Abbate that they had sent him back because he was too hot to handle. (R. 319). Levinson then turned Abbate over to the State's Attorney's office. While there, Abbate wrote a note giving them permission to go to his home and obtain the original plans. Levinson and another officer went to Abbate's home where they obtained a brown envelope containing maps and the words "Edward Hotel or Walthall Hotel, Jackson, Mississippi." (Rec. 322).

The government introduced evidence that the destruction of the installations in question would affect the security of the United States (R. 413) and that one circuit leased by the government ran through the microwave tower described by McLeod (R. 370) and was in control of the strategic air command (R. 371).

John B. Carroll, Chief of the Central Office of the telephone company, was permitted to testify that on April 28, 1955, two huts that house amplifying equipment on the coaxial cable were damaged by an explosion (R. 504) and that ten days later another hut was demolished. (R. 511). This testimony was objected to on the grounds that appellants were arrested in Chicago and were in custody at the time of these occurrences and no longer a part of the alleged conspiracy.

Barbara Navarro testified that in the latter part of April, 1955, she copied some sheets on her typewriter for Falcone and Abbate for which they paid her $2.00.

Josephine Starnes and Leilah Sandridge testified that on April 22, 1955, they drove to Billups Station on Highway 80 where they met Perry and McLeod. Josephine Starnes got in Perry's car and Perry took McLeod over to Leilah's car and left her with him (R. 656). Jo Starnes gave her a little gold band to wear that day (R. 694). Perry introduced McLeod to her as Morton and he got in the car with her and they drove towards Meridian, Miss. Near Meridian they saw a microwave tower from the highway which McLeod said would be a good one to shoot. They stopped at another microwave tower before they got to Forest, Mississippi, and McLeod said that it would be dangerous to fool with this one because it was close to the highway (R. 705).

Willard L. Arbour, an electrical engineer employed continuously by Southern Bell Telephone Company since 1930 (R. 357, *et seq.*) testified for the government. It was established that a coaxial cable is made up of a series of many small conductors contained in eight tubes. The tubes are so arranged that they will carry many conversations. A pair of tubes is necessary to complete one circuit and will carry simultaneously six hundred telephone circuits (R. 361). These coaxial cables transverse Mississippi east and west (R. 361) and north and south from New Orleans to Memphis (R. 361). A conversation grows dim after some distance unless amplified, and for that purpose, the telephone company had established repeater stations or amplifiers along the route of these cables at intervals of five and one-half miles (R. 362).

The Strategic Air Command, the Civil Aeronautics Administration and others, by virtue of some sort of a lease arrangement with the telephone company, had the exclusive right of use of some of these circuits. When a circuit is

leased to the Government or to anyone else, it is marked at certain intervals with a color indicating to telephone employees the identity of the lessee. The telephone company designated the circuits leased to the United States with the letters "G F P", meaning "Government Full Period" (R. 375). When a circuit failed, the telephone company would be notified and would repair it (R. 378). These same facilities are available to and are used by individuals and corporations on identical terms as the Government (R. 393). The equipment is owned, controlled, repaired and in every way maintained by the telephone company (R. 389). In case of interruption of service, the telephone company notified its lessee, the United States, that such interruption was necessary just as it would notify an individual (R. 393). It was the policy of the telephone company not to interrupt service supplied either to the Government or to an individual without permission of the lessee (R. 395).

Frank Ferlic, an assistant state's attorney of Cook County, Illinois, testified that he questioned Louis Abbate on April 26, 1955. Abbate told him that he had received a telephone call from Audio on April 15, 1955. When Audio mentioned something about Italian confetti, Abbate said that he did not want any violence. Audio told him it was just to scare people and there was going to be money in it for him. Abbate told him that he would contact Falcone and McLeod, and Audio said that someone would later contact him (R. 738). Abbate received a telephone call from someone with a southern accent who told him he was the man whom Audio said would contact him. Abbate then got in touch with McLeod and Falcone and not long after that he received a telephone call from the same person who identified himself as Shelby stating that he would be standing on the corner of Madison and Dearborn Streets

in Chicago with a brown envelope in his hand (R. 741). After they picked him up, they drove to a tavern known as Calverts. Shelby told them that there was a strike in the south and that he wanted Abbate or someone else to go down and dynamite some huts. Shelby opened an envelope containing a map which he called plans and pointed out certain spots designated as red and white huts which he wanted dynamited. Shelby said that they were paying the fellows down south $200 which McLeod said was peanuts. Abbate said that he was not going down south and would only act as contact man. Before Shelby left, Abbate asked him about expenses and he was told that Audio would get in touch with him and there ought to be $500 for expenses. Abbate received $500 from Audio out of which he gave $200 to McLeod and $50 to McLeod's wife. He gave Falcone $50 and kept $200 for himself. On April 22, he picked up McLeod and took him to the IC station where he gave him the money. On the following Sunday, McLeod came back and called him up and said that Abbate was in trouble with Audio.

Ferlic further testified that Abbate told Falcone that they could make money easier by selling the plans to the telephone company (R. 753). Abbate then called the local office in Chicago and talked with a man by the name of Peck who told him to call Southern Bell. After the telephone call, he and Falcone showed the copies to a man who represented himself to be Garrity. A statement made by Falcone was substantially the same as the one made by Abbate.

On cross-examination, Mr. Ferlic testified that Abbate told him, "We thought he had some dough on him (Shelby) and we thought maybe we could make a deal either one way or the other either by promising him a lot of baloney or not going through with it." Abbate said on several

occasions that he didn't intend to go down south, and that he didn't intend to do any violence. Abbate also told him that he had advised McLeod against going down there and that he could sell the plans to the telephone company instead (R. 788). Audio when questioned, denied that he ever gave any money to Abbate or Falcone (R. 789).

BASIS FOR FEDERAL JURISDICTION.

The proceedings in the United States District Court for the Southern District of Mississippi, Jackson Division, were instituted by indictment, returned by the Grand Jury of said District against the petitioners and others, for the violation of Title 18 U. S. C. §371.

REASONS FOR GRANTING WRIT.

1. The statute in this case, §1362 of Title 18 of the United States Code presents an important question which has never before been decided by any court of appellate jurisdiction of the United States. This question is: Whether approximately twenty circuits out of a total number of twenty four hundred circuits contained in a coaxial cable leased by the Southern Bell Telephone Company to the United States government, all maintained and repaired by the telephone company, are a means of communication operated and controlled by the United States within the meaning of Title 18 U.S.C. §1362.

The testimony introduced by the government on this subject (R. 357 *et seq.*) shows that the coaxial cable in question consisted of eight copper tubes. These tubes are so constructed that each will carry six hundred communication paths in one direction and that two tubes are necessary to complete the circuit, a circuit being a single mes-

sage and return. Therefore the coaxial cable involved in this case was capable of carrying a total of twenty-four hundred circuits. A coaxial cable is a recent communication engineering development and consists of several copper tubes with a copper wire running through it. It accomplishes its task by carrying electrical impulses at varying frequencies and is constructed so that six hundred of these frequencies may be carried at once in a single direction. When the government or any other person leases a circuit from the telephone company he merely is allocated a frequency for his own use.

The evidence showed that any person could lease a circuit. All work on the cable was performed by the telephone company and the government was notified of such work as any other subscriber of the company. In short the United States was not more than a subscriber to the telephone company's services. We do not believe that the framers of Section 1362 of Title 18 of the United States Code contemplated such leased telephone circuits to fall within the terms of the statute.

This statute has little or no legislative history. Apparently no one has ever been convicted for violating it, although it first came into being in 1874 when Mr. Hunter of the Committee on Military Affairs reported a "bill (H.R. No. 3432) to protect lines of telegraph constructed or used by the United States from malicious injury and obstruction". At page 4207, Volume 6 of the Congressional Record, Mr. Hunter reported as follows:

> "The bill provides any person or persons who shall wilfully or maliciously injure or destroy any of the works or property or material of any telegraphic line constructed or owned, or in the process of construction by the United States, or that may be hereafter constructed or owned or occupied and controlled by the United States, or who shall wilfully or maliciously

> interfere in any way with the working or use of any such telegraphic line or who shall wilfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such telegraphic line, shall be deemed guilty of a misdemeanor, etc. . . .".

There was no debate. On June 23, 1874, the Senate considered this House Resolution (Volume 6, page 5409, Congressional Record, 43rd Congress, First Session). The bill was reported to the Senate without amendment, ordered to a third reading, read the third time and passed. There were no reports of committees or debate in either House on the proposed legislation.

On March 4, 1909 on the revision of the penal laws of the United States (35 Stat. Section 60, Chapter 321) there was included an amendment to this statute adding the words "telephone or cable line or system". In 1940 and 1948 radio and radio stations were added to the covering of this statute, and it has since apparently remained unchanged. In fact, but for the addition of newly discovered scientific communications apparatus, the statute has remained unchanged since its original enactment.

It seems obvious that the statute came into being at a time when the Government owned and operated telegraph lines, and there was a danger that mischievous persons might, in some wise, interfere with the operation of these lines; hence the passage of a coercive statute making such persons misdemeanants.

The absurdities which may arise from prosecutions under this statute are readily apparent. The United States, being the largest subscriber to telephone service, may be considered to "operate or control" such telephone lines as enter post offices, court houses, buildings containing offices of any of hundreds of agencies even though the office is located in a large private office building. Any destruction of such a line could be prosecuted if wilful or malicious.

The states have statutes prohibiting destruction of property and this statute may, as in this case, result in double prosecution. This Court should decide this problem arising under the statute in order that a clear interpretation of it may prevent such prosecution as are not properly within its scope.

2. This case further presents the problem, which this Court has recently recognized by its grant of Writs of Certiorari, of whether the petitioners were twice placed in jeopardy. The evidence showed that petitioners were convicted of the crime of conspiracy under the law of the State of Illinois. At that trial in Illinois the prosecution was based upon facts which were identical with those presented in the trial of the present case with the exception that in the present case evidence as to operation and control by the United States, was introduced. We do not wish to burden the court with a reiteration of the arguments presented in these cases but we wish to call the Court's attention to the following cases in which certiorari has been granted: *Bartkus, Petitioner* v. *People of the State of Illinois,* No. 12 Misc. (Facts and opinion 7 Ill. 2d 138, 130 N.E. 2d 187), *Hoag, Petitioner* v. *State of New Jersey,* No. 61 Misc. (Facts and opinion 35 N.J. Super. 555, 114 A. 2d 573; 21 N.J. 496, 122 A. 2d 628), *Ladner, Petitioner* v. *United States of America,* No. 80 Misc. (Facts and opinion, 5th Circuit, 230 F. 2d 726). Through these cases run variants of the question here presented by the petitioners: Whether a series of prosecutions, either by separate counts or separate indictments, in a State or Federal court, for crimes arising out of the same conduct or course of conduct, deny to the defendant due process of law as secured and guaranteed by the Vth and XIVth Amendments to the Constitution of the United States, and subject him to be twice placed in jeopardy in violation of the Vth Amendment to the Constitution of the United States.

We believe that the Court, in exercise of its general powers of supervision should grant this petition in order that the petitioner may benefit from the reexamination of this question of double jeopardy.

3. This case presents the question of whether the conviction of petitioners, for conspiring to destroy a means of communication operated and controlled by the United States, may stand, where the petitioners had no knowledge of the existence of such means of communication or its operation and control by the United States. An analysis of the cases of the various Courts of Appeal demonstrate a marked divergence of opinions on the question of whether in a conspiracy case such knowledge can be imputed.

The evidence presented by the government showed that Shelby solicited the petitioners to destroy property of the Southern Bell Telephone Company. There is some testimony that two of the co-defendants, Perry and Shelby, knew of the existence of telephone circuits leased to the United States, but there is no showing that this knowledge was ever imparted to the petitioners, Abbate and Falcone. The Court of Appeals said:

> "... Abbate and Falcone were bound by the knowledge of Shelby and Perry that many of the circuits to be destroyed were operated and controlled by the government. Further, the jury could well find that they conspired to stop all communications over any of the cables or facilities regardless of who operated or controlled the circuits and were bound by what would have been the natural consequences of their conspiracy."

In support of this the Court of Appeals cited *Pereira* v. *United States*, 347 U.S. 1 (1954); *Clark* v. *United States*, 213 F. 2d 63 (5 Cir. 1954); *Williams* v. *United States*, 295 Fed. 302 (5 Cir. 1923); *United States* v. *Anderson*, 101 F. 2d 325, (7 Cir. 1939). These cases are not applicable to

the present situation and the Court of Appeals erred in so applying them.

The *Pereira* case was conspiracy to violate the mail fraud act 18 U.S.C. 1341. There this Court held that it was common knowledge that checks drawn on out of town banks presented to a bank for collection are sent by mail to the drawee bank.

The *Williams* and *Anderson* cases deal with railroads and again apply the common knowledge test. In the *Williams* case it was held that it was common knowledge that railroads carry interstate commerce and therefore a conspiracy to destroy railroad equipment is a conspiracy to restrain interstate commerce. In the *Anderson* case it was held that it was common knowledge that railroads carry mail and therefore a conspiracy to destroy railroad tracks was a conspiracy to obstruct the mails.

The "Common Knowledge" test should not have been applied in this case for there is not involved in this case the conditions which were present in the "common knowledge" cases. In those cases there was involved a course of conduct which is well known, such as, that banks send checks by mail, that railroads carry interstate commerce, that railroads carry mail. In the present case there is no such well known course of conduct (*i.e.*, that telephone companies lease their circuits to the government).

The *Clark* case applies a different theory and one which is peculiar to substantive stolen property cases. That is, "that one who receives stolen property does so at his peril of their having been stolen from an interstate shipment." However, the *Clark* case applies the rule to conspiracy to violate the Stolen Property Act, thus imputing knowledge to a member of an alleged conspiracy who lacks such knowledge. This decision is in conflict with the decision of other courts of appeal.

The case is based upon five decisions of the Court of Appeals for the Second Circuit, *United States* v. *Crimmins*, 123 F. 2d 271; *United States* v. *Bollenbach*, 157 F. 2d 199; *United States* v. *Sherman*, 171 F. 2d 619; *United States* v. *Smolin*, 182 F. 2d 782; and *United States* v. *Cordo*, 186 F. 2d 144.

The *Cordo* case clearly held that the names of the consignees on the stolen cartons gave the defendants knowledge of the nature of the shipment. From that knowledge, the crime of conspiracy could be inferred.

In the *Smolin* case, again there were names and addresses of the consignees and consigners on the cartons stolen.

In the *Sherman* case the convictions of two of the defendants of conspiracy were reversed because there was no proof of the *requisite scienter*.

Bollenbach held that knowledge that the property was transported in interstate commerce was a necessary element of conspiracy to violate the Stolen Property Act and that this could not be presumed from the mere possession of stolen property recently transported in interstate commerce.

Crimmins is by far the leading case in this field of conspiracy and presents one of the clearest statements of law written on the subject of *scienter* in the crime of conspiracy.

In the *Crimmins* case the defendant was convicted of conspiracy to transport stolen securities in interstate commerce. The court said that the jury was justified in concluding that Crimmins knew that they were stolen. There was also evidence that they had been transported in interstate commerce. However, there was no evidence

to show that Crimmins knew of this aspect of the transaction.

Judge Learned Hand, in passing on the question whether Crimmins was guilty of the conspiracy, said, "But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellow done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. *Langer* v. *United States*, 8 Cir., 76 F. 2d 817, 827; *Fulbright* v. *United States*, 8 Cir., 91 F. 2d 210, 213, 214; *McLeroy* v. *State*, 120 Ala. 274, 25 So. 247; *Powers* v. *Commonwealth*, 110 Ky. 386, 61 S.W. 735, 63 S.W. 976, 53 L.R.A. 245; *Gabbard* v. *Commonwealth*, 193 Ky. 460, 236 S.W. 942. *Cf. Neal* v. *United States*, 8 Cir., 102 F. 2d 643, 648. And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past."

The reasoning of Judge Hand can be applied with equal persuasion in our present case. Abbate and Falcone did

not know that the installation that Shelby wanted to destroy contained circuits leased or operated by the government.

This language of Judge Hand is clearly at variance with the language of the Court of Appeals for the Fifth Circuit, in this case, to the effect that knowledge of one conspirator may be inferred as being possessed by a co-conspirator for the purpose of determining the object of the conspiracy.

While an act of a conspirator may bind another member of the conspiracy the knowledge of one cannot be charged to another. To do so creates a crime where a crime does not exist.

Because the opinion of the Court of Appeals for the Fifth Circuit is at such variance with the decision of the other courts of appeal, and because the law was applied in a manner so at variance with the accepted rule, this question becomes a matter for this Court to decide.

4. It is our contention that the petitioners never intended to enter the alleged conspiracy as is demonstrated by their immediate disclosure to the telephone company of the plans of Shelby to destroy telephone installations to hurry a strike settlement.

The crime of conspiracy consists of a partnership agreement having crime as the partnership business done by overt acts. *United States* v. *Rollnick,* C.C.A.N.Y. 1937, 91 F. 2d 911. It requires that each have the intent to engage in the common purpose. *Bridges* v. *United States,* C.A. Cal. 1952, 199 F. 2d 811. The evidence relating to the conduct of appellants refutes the charge that they were engaged in a conspiracy as charged in the indictment.

On April 19, 1955, James Shelby solicited appellants to destroy telephone installations of the Southern Bell Tele-

phone Company. On April 20, 1955, appellants informed the officials of the telephone company of this plan. The witness, Forsythe, a special agent for the telephone company, testified that a call was made to the telephone company by someone who had information of plans to destroy telephone installations. (R. 278, 284).

McLeod testified that the day after their meeting with Shelby, Falcone and Abbate said that they were not going on with Shelby's proposal (R. 54) and that they would take the plans to the telephone company and inform them. (R. 66). McLeod testified that he went to Jackson, Mississippi, on his own accord after Abbate and Falcone refused to go, saying that they did not want any part of it. (R. 182)

Upon his arrival in Jackson, Mississippi, McLeod told Perry and Shelby that Abbate and Falcone had backed out and that he would have to work alone. (R. 71).

The court below erroneously concluded that the petitioners entered into a conspiracy with Shelby in Chicago, although the record is replete with evidence that neither petitioner intended to participate in this venture. According to this reasoning, anyone listening to a proposal to commit a crime becomes a fellow conspirator, which would necessarily include any government agent who is solicited to engage in a conspiracy but who has no intention of entering into such a pact.

The facts we have called to the attention of the court amply support our contention that the petitioners never intended to join Shelby in his proposal and immediately informed the telephone company of Shelby's intentions and plans. It is untenable to support the charge that the petitioners engaged in a conspiracy when the evidence shows that they immediately informed the telephone com-

pany of the plans to destroy their installations. Common experience tells us that men do not engage in a conspiracy and at the same time intend to disclose their participation to the persons against whom it is directed.

Let us assume *arguendo* that the petitioners were engaged in a conspiracy for one day as is contended by the government, they immediately withdrew from the conspiracy and abandoned the design charged in the indictment by calling the telephone company on the following day and informing them of the plans.

The Court below failed to correctly apply the rule relating to the withdrawal of a conspirator. The overt acts 1, 2 and 9 charged against the petitioners in the indictment merely allege that the parties met on April 19, 1955, in Chicago, Illinois; that Shelby delivered maps of telephone installations; and that on April 25th, the petitioners made copies of said plans. Overt acts 1 and 2 do not constitute overt acts in furtherance of a conspiracy, overt act 9 took place after the petitioners had informed McLeod that they would not engage in Shelby's plans and Abbate had called the telephone company to inform them of the plans for the destruction of telephone installations.

The court below in holding petitioners were engaged in the conspiracy and did not withdraw from the alleged conspiracy before an overt act was committed, based its opinion upon the conclusion that petitioners sent McLeod to Jackson, Mississippi. In arriving at this result, the court overlooked in its opinion the following facts in evidence: (1) McLeod testified that the day after Shelby met the petitioners, Falcone and Abbate, they told McLeod that they "were backing out." (R. 55). (2) On cross-examination, McLeod testified that he went to Jackson, Mississippi, of his own accord and that Abbate and Falcone

refused to go, saying that they did not want any part of it (R. 182). (3) When Abbate was questioned by the prosecutors in Chicago, he stated that he advised McLeod against going from Chicago to Jackson, Mississippi (R. 788) and that it was their intention to take Shelby's money without carrying out his proposal (R. 788). (4) Abbate told McLeod before the latter left for Jackson that he intended to take the plans furnished by Shelby to the telephone company and inform them of the proposals made by Shelby (R. 66). (5) McLeod was aware when he left Chicago that Abbate and Falcone had deserted him. McLeod testified that when he arrived in Jackson he did not register in the Hotel, to which he was directed by Shelby, because he was afraid he was being sold out in Chicago (R. 66). (6) Upon his arrival in Jackson, McLeod told Perry that there were supposed to be others hired but they never showed up and that he would have to work alone (R. 71). (7) Later in the day, McLeod met Shelby and told him that Abbate was going to double cross him (R. 90). (8) McLeod was forced to return to Chicago by Shelby and Perry, and was angry because they would not let him destroy the telephone installations (R. 105). (9) McLeod testified that when he returned to Chicago, Abbate asked him if any of the boys wanted to knock his ears down for that double cross (R. 108); and said he was going to return the money because he was afraid somebody was going to put a hole in his head (R. 109). (10) McLeod also testified that before he left for Jackson, Mississippi, Abbate told him that he planned to take the plans to the telephone company and let them know what the union intended to do in the south (R. 113). (11) The day after Shelby solicited the petitioners to destroy the telephone installations, the petitioners informed the officials of the telephone company of this plan (R. 278, 284). (12) Forsythe, a special agent

for the telephone company, testified that a call was received from someone who claimed he had information of plans to destroy telephone installations (R. 278, 284).

The petitioners did not commit an overt act which was intended to be in furtherance of the conspiracy. We submit that the court below failed to properly apply the law on the withdrawal of a conspirator prior to an overt act as stated in *Marino* v. *United States,* 91 F. 2d 691 and cases cited therein in note 15; *United States* v. *Britton,* 108 U.S. 199, *United States* v. *Beck,* 118 F. 2d 178.

5. The trial court permitted evidence of several bombings which occurred after petitioners had withdrawn from the alleged conspiracy to be introduced against the petitioners. The rule is well established that the acts of a conspirator committed after a member of the conspiracy has effectively withdrawn is not admissible as against such former conspirator.

The court below cites *Eldredge* v. *United States,* 62 F. 2d 49, in support of its opinion that the evidence of the destruction of several huts after petitioners admittedly withdrew from the conspiracy was admissible. In the *Eldredge* case, the accused advised his associates to confess. The court in passing on the question whether he withdrew from the conspiracy said, "We hold therefore, that Eldredge did not manifest an intent, in the conversation with his confederate, that the shortage be revealed and their crime confessed." The court stated the general rule of the effect of the withdrawal from a conspiracy to be that "If a member effectively withdraws from a conspiracy, he is not liable for acts of his former associates after his withdrawal. But withdrawal must be accomplished by some affirmative act *Boyle* v. *United States,* (C.C.A. 7) 259 Fed. 803." Also citing *Hyde* v. *United States,* 225 U.S. 347. This statement of the law has never been modified or

overruled. The test of withdrawal is one of assent. *Ware* v. *U. S.*, (C.C.A. 8) 154 Fed. 577. The petitioners prior to the destruction of the huts no longer were part of the alleged conspiracy for they had made a complete disclosure of the plans to the telephone company in Chicago, and the State's Attorney of Cook County, Illinois. The petitioners made known the plans of Shelby on April 20th, whereas the destruction of the huts took place on April 28th. They have met the test of withdrawal by positive affirmative action which disclosed the plans of Shelby to destroy the installations of the telephone company.

Lutwak v. *United States*, 334 U.S. 607, cited by the court of appeals below is distinguishable from our present case. There all the parties committed acts after the termination of the conspiracy to indicate that they were involved in the conspiracy. In our present case, the petitioners had withdrawn effectively from the conspiracy. It is also important to note that there is no evidence that the other defendants were involved or responsible for the bombings. The destruction of several huts after Abbate and Falcone had withdrawn from the alleged conspiracy had no relevancy to prove a conspiracy against the petitioners.

The petitioners, whose theory of the case rested on the testimony which demonstrated that they had withdrawn from the alleged conspiracy, were entitled to a ruling by the court limiting the evidence against them to acts committed prior to their withdrawal. Undoubtedly the introduction of this evidence caused the jury to be prejudiced against them and find them guilty.

It may readily be seen therefore that the Court of Appeals was gravely in error when it held that such evidence could be introduced against the petitioners. Such a holding is at great variance with the rule laid down in the other Circuits and by this Court.

CONCLUSION.

For the above reasons we believe that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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On the brief.

APPENDIX 1.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16226

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

(August 8, 1957.)

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge: The four appellants were jointly indicted for conspiring[1] to commit the offense denounced

[1] In violation of the general conspiracy statute covering a conspiracy "to commit any offense against the United States." 18 U.S.C.A. §371.

by 18 U.S.C.A. 1362,[2] that is willfully or maliciously to injure or destroy means of communication operated or controlled by the United States. The overt acts charged extended over a period of ten days, from April 19 to April 28, 1955. A strike was then going on by the Communication Workers of America, CIO, against the Southern Bell Telephone and Telegraph Company.[3]

The defendants Shelby and Perry were officers of the Communications Workers of America, Shelby being an assistant to a vice-president stationed in Washington, D. C. and Perry being President of the Jackson, Mississippi local of that union. Abbate and Falcone were residents of Chicago, Illinois. Norman D. McLeod, also named in the indictment as co-conspirator but not indicted, was on parole from the Oklahoma State Penitentiary where he had been serving a sentence for armed robbery. He turned state's evidence and was the first and perhaps the principal witness for the Government.

Prior to arraignment, Shelby and Perry filed a joint motion for a severance and separate trial, setting out that Abbate and Falcone had been convicted in the Crim-

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[2] "§ 1362. *Communication lines, stations or systems*:

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[3] According to the testimony, the strike began about March 14 and continued until about May 20, 1955.

inal Court of Cook County, Illinois[1] for a crime based upon the identical acts charged in this case, and that, subsequent to their arrests in Illinois, Falcone and Abbate had made lengthy confessions and statements implicating Shelby in the alleged conspiracy. Their motion for severance was overruled.

McLeod's testimony consumes nearly 200 pages of the typed record. He testified in detail to the formation of the conspiracy and to the acts of each of the conspirators. If believed by the jury, his testimony sufficed for the conviction of all four defendants. Its credibility, however, was severely attacked, not only because of its inherent weakness as the testimony of a co-conspirator, but also because of his conviction of grand theft in California and of armed robbery in Oklahoma. Further, McLeod admitted to a long career of criminal dynamiting, and had refused to testify for the Government until assured by one of the attorneys for the telephone company that "he would see to it" that McLeod was not indicted for conspiracy, and, apparently, that promise had been kept. The Government, therefore, made every effort to corroborate McLeod's testimony.

The taxicab driver who had transported McLeod from Canton, Mississippi to Jackson, Mississippi was produced, as was the Chicago bartender in whose tavern the conspiracy had been hatched. Abbate was the only conspirator other than McLeod whom the bartender could definitely identify. The Government then introduced an investigator for the Illinois Bell Telephone Company and a detective attached to the Chicago Police Department, who testified at great length concerning the statements

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[1] In their pre-sentence hearing it was brought out that they pleaded guilty and received sentences of three months.

and admissions of Abbate which did corroborate McLeod in many particulars, including operation sheets and maps showing details of the planned criminal dynamiting. Over the strenuous objections of Shelby and Perry, the testimony as to Abbate's statements and confessions was admitted for the time being as against all four defendants, with the court stating,

> "After its over, I shall tell the jury as to how to weigh the evidence. It's incomplete at this time. The case is incomplete and I, myself, I am not fully informed to instruct the jury."

This testimony was received about the middle of the week-long trial.

The Government continued to present a most impressive case. It introduced experts to prove that the Government operated and controlled most of the telephone circuits planned for destruction. It showed by former co-workers of Shelby and of Perry that they had worked on Government circuits and were familiar with their operation and control. It proved Shelby's transportation to Chicago and his registration at a hotel there under an assumed name. It proved by a stenographer that she had retyped the operation plans at the instance of Abbate and Falcone. It proved by two young women residents of Jackson, Mississippi, that, at Perry's request one of them had accompanied McLeod on a tour of inspection to familiarize himself with the installations to be dynamited, the young woman posing as his wife to allay suspicion in the event they were questioned. As an impressive closing witness, the government introduced Frank Ferlic, Esquire, Assistant State's Attorney of Chicago, Illinois, who had interviewed Abbate and Falcone. The court again declined a mistrial and separate trial as to Shelby and Perry, and declined to limit the consideration of Abbate's

and Falcone's statements to the one making the statements, stating that "* * * when it comes time to charge the jury, then, I will tell them what the law is."

At four fifteen on Friday afternoon, the last day of the trial, the court commenced its lengthy (more than forty typed pages) charge to the jury. When the charge had been more than half completed, the court finally got around to instructing the jury as follows:

> "Now, as to these two men, when they were arrested by the officers and were placed in prison, they no longer had any power to commit acts or to do things that might bind the others and for that reason, while I had some question in my mind at first, a careful examination of the law has convinced me that I should charge you that insofar as their statements to the police officers up there are concerned, and to the extent that they may involve anybody else, it is not to be considered against the other person. In other words, it can be considered against them alone and it can, even though they were out of the conspiracy, that evidence is admissible against them for the purpose of proving that they were parties to the conspiracy. In other words, they can make admissions insofar as they are concerned and it is receivable in evidence to be received along with all the other evidence to determine whether they were parties to the conspiracy."

It is not necessary now to rule on whether the district court abused its discretion in overruling the joint motion of Shelby and Perry for a trial separate from that of Abbate and Falcone,[5] for upon the plainest of principles it is clear that the judgments of conviction against them must be reversed. At the time of their statements, Ab-

[5] See **Schaffer v. United States**, 221 F. 2d 17, 19 (5th Cir. 1955).

bate and Falcone were no longer parties to the conspiracy. Permitting their statements to be received in evidence against Shelby and Perry was error which could not be cured by the mild admonition contained in the court's final charge to the jury.[6]

As against Abbate and Falcone, the case is different. They undertook to withdraw from the conspiracy and to secure a bid of some six thousand dollars from the telephone company for the maps and operation plans. They had themselves, however, already committed overt acts and had dispatched McLeod on his mission of criminal destruction. Their crime was then complete,[7] and their subsequent withdrawal could be considered only in the fixing of their punishment.

While the conspiracy was in progress, Abbate and Falcone were bound by the knowledge of Shelby and Perry that many of the circuits to be destroyed were operated and controlled by the Government. Further, the jury could well find that they conspired to stop all communications over any of the cables or facilities regardless of who operated or controlled the circuits, and were bound by what would have been the natural consequences of their conspiracy.[8]

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[6] **Delli Paoli v. United States**, 352 U.S. 232 (1957); **Lutwak v. United States**, 344 U.S. 604, 617, 618 (1953); **Krulewitch v. United States**, 336 U.S. 440, 443 (1949); **Fiswick v. United States**, 329 U.S. 211, 217 (1946); **Scarborough v. United States**, 232 F. 2d 412, 415 (5th Cir. 1956).

[7] See **United States v. Britton**, 108 U.S. 199 (1883); **United States v. Beck**, 118 F. 2d 178 (7th Cir. 1941); **Eldredge v. United States**, 62 F. 2d 449 (10th Cir. 1932).

[8] See **Pereira v. United States**, 347 U.S. 1 (1954); **Clark v. United States**, 213 F. 2d 63, 65 (5th Cir. 1954); **Williams v. United States**, 295 Fed. 302, 305 (5th Cir. 1923); **United States v. Anderson**, 101 F. 2d 325, 330 (7th Cir. 1939).

The destruction by dynamite of some of the facilities near Jackson, Mississippi occurred on April 28, two days after Abbate and Falcone had been arrested in Chicago. Such acts, however, stand upon a different footing from declarations of co-conspirators, and were relevant as additional proof of the conspiracy.[9] The facilities destroyed were among those included in the criminal plans. Shelby and Perry were still at large, and the jury could reasonably infer that they were still acting pursuant to the conspiracy.

There was ample evidence from which the jury could have found that, though the facilities were owned by the telephone company, many of the circuits were under full time operation and control by the Government, and that the telephone company could not even make repairs on such circuits without first obtaining the Government's permission. The statute, 18 U.S.C.A. §1362, Footnote 2, *supra*, does not require that the Government own the lines or means of communication, but only that they be "operated or controlled by the United States." At least six witnesses testified to facts from which the jury could find such operation or control. Since that issue was so strongly controverted, we find no reversible error in admitting the testimony of the two Army officers stressing the importance of the lines of communication to the National defense.

As to Abbate and Falcone, the judgments are affirmed, and as to Shelby and Perry, the judgments are reversed and the case remanded.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

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[9] **Lutwak v. United States** 344 U.S. 604, 617 (1953); **Eldredge v. United States**, 62 F. 2d 449, 451 (10th Cir. 1932).

APPENDIX 2.

Extract from the Minutes of August 8, 1957.

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY,

No. 16226 versus

UNITED STATES OF AMERICA.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this court that the judgments of the said District Court as to Abbate and Falcone in this cause be, and the same are hereby, affirmed; and as to Shelby and Perry, that said judgments be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court.